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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAR 19 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of the )  
 )  
Association of Communications )  
Enterprises Petition for Preemption )  
of Alabama Taxation Policy )

CC Docket No. 01-40

COMMENTS OF  
NATIONAL ALEC ASSOCIATION/PREPAID COMMUNICATIONS ASSOCIATION

The National ALEC Association/Prepaid Communications Association ("NALA/PCA") hereby files these comments in support of the above-captioned petition of the Association of Communications Enterprises ("ASCENT") for preemption of the City of Montgomery's telecommunications license and privilege tax.<sup>1</sup> As detailed in the *ASCENT Petition*, the City of Montgomery, Alabama currently imposes a \$12,000 flat privilege and license tax on any entity providing local exchange service in the city, without regard to the size of the carrier, number of customers served by the carrier, or revenues earned by the carrier. The effect of this taxation policy is to discourage competitors from serving the local telephone market in Montgomery, thereby depriving the citizens of Montgomery from the benefits of competition intended by the Telecommunications Act of 1996 ("1996 Act"). Accordingly, NALA/PCA urges the Commission to grant the *ASCENT Petition* and preempt the City of Montgomery's anticompetitive taxation policy.

<sup>1</sup>See Association of Communications Enterprises, "Petition for Preemption and Declaratory Ruling," CC Docket No. 01-40 (filed January 18, 2001) ("*ASCENT Petition*"); see also "Pleading Cycle Established for Comments on Petition of ASCENT for Preemption of

Footnote continued on next page

## **Background**

NALA/PCA is a trade association comprised of companies that since 1996 have been providing prepaid local telephone service to hundreds of thousands of residential consumers unwanted by traditional telephone companies. These consumers are unwanted because they may have poor credit histories, cannot provide a security deposit, had telephone service disconnected in the past, have past due balances, or lack sufficient identification. In many cases, the service provided by NALA/PCA members is the only option for local phone service, including access to 911 emergency service, for millions of American consumers.

## **Discussion**

### **I. CITY OF MONTGOMERY ORDINANCE 48-91 § 19C-21(I) VIOLATES SECTION 253 OF THE ACT**

As discussed in the *ASCENT Petition*, the City of Montgomery currently imposes on all telecommunications companies providing local exchange service within its boundaries the maximum license and privilege tax permitted by Alabama law. This flat rate, “one size fits all” annual tax of \$12,000 applies to all local exchange carriers equally, regardless of the size of the carrier, customers served by the carrier, or revenues earned by the carrier. Thus, Bell South, which provides service to more than 175,000 customers in Montgomery,<sup>2</sup> pays the same license and privilege tax as a carrier serving only a handful of customers.

Section 253(a) of the Communications Act provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit *or have the effect of*

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Montgomery, Alabama Taxation Policy,” DA 01-460, CC Docket No. 01-40 (February 16, 2001).

<sup>2</sup>*ASCENT Petition* at 3.

*prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>3</sup> In determining whether a local requirement falls within this prohibition, the Commission will consider whether the requirement “materially inhibit[s] or limit[s] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>4</sup>

The Montgomery taxation ordinance violates Section 253(a). As discussed in the *ASCENT Petition*, Bell South is able to spread the cost of its \$12,000 Montgomery tax liability over the large customer base it has captured during its years as a monopoly provider.<sup>5</sup> NALA/PCA members who are currently providing service in Montgomery have a small customer base over which to spread this tax liability. NALA/PCA members who would like to enter the Montgomery market initially have no customer base over which to spread this tax liability. The economic burden of Montgomery’s flat tax has caused NALA/PCA members to stop providing service in Montgomery or to avoid entering Montgomery in the first instance. Thus, Montgomery’s telecommunications tax ordinance has had the “the effect of prohibiting” competitive entry in violation of Section 253(a).<sup>6</sup>

## **II. THE COMMISSION SHOULD PREEMPT THE MONTGOMERY ORDINANCE TO PROTECT THE INTERESTS OF CONSUMERS**

By creating a barrier that inhibits competitors from entering the local market in Montgomery, the city’s tax ordinance deprives Montgomery residents of the benefits of

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<sup>3</sup>47 U.S.C. § 253(a) (emphasis added).

<sup>4</sup>The Public Utility Commission of Texas et al, 13 FCC Rcd 3460, ¶ 22 (October 1, 1997).

<sup>5</sup>*ASCENT Petition* at 15.

<sup>6</sup>47 U.S.C. § 253(a).

competition. In passing the 1996 Act, Congress sought to benefit “all Americans by opening all telecommunications markets to competition.”<sup>7</sup> The ordinance at issue here, however, conflicts with this goal by limiting the entry of new competitors in Montgomery. By preempting the Montgomery ordinance, the Commission will ensure that new competitors can enter the local market in Montgomery on an equal footing with Bell South for the benefit of all of Montgomery’s residents consistent with the intent of the 1996 Act.

### **III. THE COMMISSION SHOULD PREEMPT THE MONTGOMERY ORDINANCE TO ENSURE THAT OTHER MUNICIPALITIES THROUGHOUT THE UNITED STATES DO NOT ADOPT SIMILAR ANTICOMPETITIVE TAXATION POLICIES**

A Commission decision upholding the Montgomery flat tax will set a dangerous precedent that other states or municipalities will use to impose similar fees and taxes. A flat tax on all LECs like the one Montgomery has imposed bears no relationship to the costs these new entrants impose on the city. Thus, such a tax creates a barrier to entry that insulates the incumbent LEC from competition. The Commission must grant the *ASCENT Petition* to send a message to municipalities throughout the country that imposing exorbitant flat taxes on new entrants is not consistent with the 1996 Act.

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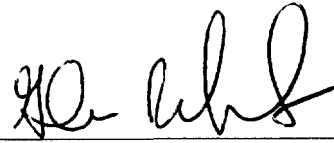
<sup>7</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (preamble).

### **Conclusion**

Based on the foregoing, NALA/PCA urges the Commission to grant the *ASCENT Petition* and preempt the City of Montgomery's anticompetitive taxation policy.

Respectfully submitted,

**NATIONAL ALEC ASSOCIATION/  
PREPAID COMMUNICATIONS  
ASSOCIATION**

A handwritten signature in black ink, appearing to read "Glenn Richards", written over a horizontal line.

Glenn S. Richards  
David S. Konczal  
Shaw Pittman  
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Dated: March 19, 2001

**CERTIFICATE OF SERVICE**

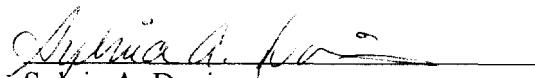
I, Sylvia A. Davis, a secretary to the law firm of ShawPittman, hereby certify that on this 19<sup>th</sup> day of March 2001, served a true copy of the foregoing **“COMMENTS OF NATIONAL ALEC ASSOCIATION/PREPAID COMMUNICATIONS ASSOCIATION”** by first class United States Mail, postage prepaid, upon the following:

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Sylvia A. Davis